

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
ASHEVILLE DIVISION  
1:05CV93-MU-02

THOMAS T. DILLARD, JR.,	)	
Petitioner,	)	
	)	
v.	)	ORDER
	)	
ANTHONY HATHAWAY, Supt.,	)	
Respondent.	)	
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THIS MATTER comes before the Court on the petitioner's Petition for a Writ of Habeas Corpus, filed April 27, 2005. For the reasons stated herein, the instant Petition will be dismissed.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

According to the Petition, in September 1986 and December 1991, the Superior Courts of Haywood and Henderson Counties, respectively, convicted him of multiple counts of Breaking and Entering, Larceny and/or Possession of Stolen Goods. Upon his convictions, the Superior Court of Haywood County sentenced the petitioner to 20 years imprisonment, and the Superior Court of Henderson County sentenced him to 50 years imprisonment.

The petitioner did not directly appeal any of his convictions or his two sentences. Rather, after allowing more than a decade to pass since the time that both of his cases became final, in September 2004, the petitioner filed Motions for Appropriate Relief

("MAR" hereafter) challenging his Haywood and Henderson County cases. Not surprisingly, however, those Motions were summarily rejected by the two Superior Courts. The petitioner subsequently filed Petitions for Writs of Certiorari in the State Court of Appeals, challenging the Superior Courts' denials of his MARs, but those Petitions also were denied. Thereafter, the petitioner's Petition for a Writ of Certiorari was denied by the State Supreme Court.

Undaunted by his lack of success, the petitioner now has filed the instant federal Petition for a Writ of Habeas Corpus, arguing that the N.C. Department of Corrections has erroneously collected restitution from him for convictions whose judgments previously were terminated. However, as is obvious from the foregoing recitation, the instant Petition is subject to summary dismissal for several reasons, including the ones which will be hereafter set forth.

## **II. ANALYSIS**

\_\_\_\_First, the petitioner is attempting to challenge two separate sets of convictions--which convictions were imposed by different State Courts on different occasions--within this single federal Petition. However, pursuant to Rule 2(e) of the Rules Governing Habeas Corpus Cases under 28 U.S.C. §2254, "[a] petitioner who seeks relief from judgments of more than one state court must file a separate petition covering the judgment or judgments of each court." Consequently, the petitioner cannot proceed on his

Petition as it now is drafted.

Second, and more critically, the petitioner's challenge--that the N.C. Department of Corrections is erroneously collecting restitution from him for convictions whose judgments previously were terminated--simply is not cognizable in a habeas Petition under §2254 such as this one. To be sure, habeas review under §2254 is appropriate when a state prisoner is attacking either the fact or length of a conviction and/or confinement. Preiser v. Rodriguez, 411 U.S. 475 (1973). However, claims which relate to the execution of a particular sentence, such as the allegation raised herein, are not cognizable in this type of proceeding. Thus, the petitioner cannot proceed on the instant allegation.

Third, in April 1996, the U.S. Congress enacted the Antiterrorism and Effective Death Penalty Act, effectively amending 28 U.S.C. §2254 by adding the following language:

A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review:

(B) the date on which the impediment to filing an application created by State in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

© the date on which the constitutional right asserted was initially recognized by the Supreme Court; if the right

has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Furthermore, the AEDPA provides that the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Here, even assuming the petitioner could proceed with his non-habeas challenges to multiple judgments in this single proceeding, the record reflects that such challenge still would have to be dismissed as time-barred. That is, the record establishes that the petitioner did not directly appeal either his September 22, 1986 or his December 17, 1991 convictions. Therefore, those cases became final no later than October 2, 1986 and December 30, 1991--that is, at the expiration of the brief period during which the petitioner could have filed his notices of appeal in State court.

In any event, since the petitioner's convictions and sentences became final prior to the time that the AEDPA was enacted, under relevant case law, the petitioner's one-year limitations period in both cases began to run on the AEDPA's enactment date of April 24, 1996, and expired one year later on April 24, 1997. See Harris v. Hutchinson, 209 F.3d 325, 328 (4<sup>th</sup> Cir. 2000) (noting that the one-year limitation period for pre-AEDPA cases begins on April 24,

1996); Brown v. Angelone, 150 F.3d 370, 375 (4<sup>th</sup> Cir. 1998) (same); and Hernandez v. Caldwell, 225 F.3d 435, 439 (4<sup>th</sup> Cir. 2000) (noting that absent tolling, the one-year period expires on April 24, 1997). Obviously, the petitioner did not file this action by that 1997 expiration date. Thus, the petitioner's Petition clearly was time-barred by the point that he filed it in this Court on April 27, 2005.

Moreover, notwithstanding the fact of the petitioner's belated attempts to pursue collateral review of those cases in late 2004, such fact is of little consequence in this case. Indeed, by the time that the petitioner filed his various MARs, his federal deadline had long before expired. Therefore, even if the Court were to toll the one-year deadline for the brief six-month period during which the petitioner's cases were on collateral review, such extension still is simply too little too late, and cannot revive a Petition which simply was dead upon its arrival at this Court.

Furthermore, it is quite apparent that the petitioner, despite having been given an opportunity to do so, has failed to articulate a proper basis for tolling the applicable limitation period, or for otherwise extending the time in which he had to file the instant Motion.<sup>1</sup> Rather, the petitioner, aware of this bar to his

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<sup>1</sup>In January 2002, the Fourth Circuit Court of Appeals decided the case of Hill v. Braxton, 277 F.3d 701, 706 (4<sup>th</sup> Cir. 2002). In that case, the Court concluded that "when a federal habeas court, prior to trial, perceives a pro-se [petition or Motion to Vacate] to be untimely and the state has not filed a motion to dismiss based upon the one-year limitations period, the [district] court must warn the petitioner that the case is subject to dismissal . . . absent a sufficient explanation." Consistent with that requirement, in December 2004, the Congress amended the rules governing habeas proceedings and modified the Motion to Vacate forms to comply with the new

Petition, simply claims that his Petition is not time-barred since he only recently became aware that he was going

to be required to make restitution on the cases in question. Therefore, the petitioner's Motion to Vacate must be dismissed.

### III. CONCLUSION

The instant Habeas Petition contains challenges to judgments from more than one state court, it does not challenge matters which are cognizable under §2254, and it clearly was untimely filed in this Court. Accordingly, such Petition will be dismissed.

### IV. ORDER

**NOW, THEREFORE, IT IS HEREBY ORDERED** that the petitioner's Petition for a Writ of Habeas Corpus is **DISMISSED**.

**SO ORDERED**, this \_\_2nd\_\_ day of \_\_May\_\_\_\_\_, 2005.

\_\_\_\_\_  
**GRAHAM C. MULLEN**  
**Chief U.S. District Judge**

\_\_\_\_\_  
requirement. The new Motion to Vacate forms now include a section which directs the petitioner to address the "timeliness of [his/her] motion." In particular, such new provision advises the petitioner that if his/her conviction became final more than one year before the time that the Motion to Vacate is being submitted, he/she "must explain why the one-year statute of limitations as contained in 28 U.S.C. §2255 [also set forth on the form] does not bar [such] motion." Accordingly, given the fact that the petitioner has attempted to address the timeliness of his Motion to Vacate--albeit unsuccessfully--the Court concludes that it need not provide the petitioner with any additional notice in this matter.

